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No. 429

In the Supreme Court of the United States

OCTOBER TERM, 1931

D. GINSBERG & SONS, INC., PETITIONER

v.

JOSEPH POPKIN

(Matter of Foster Construction Corporation, Bankrupt)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

LEO J. LINDER
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Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 38) is reported in 50 F. (2d) 693. The opinion of the District Court for the Southern District of New York (R. 29) is reported in 47 F. (2d) 276.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered July 1, 1931 (R. 43). The petition for writ of certiorari was filed October 1, 1931, and was granted November 2, 1931 (R. 44). The jurisdiction of this court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

(1) Has the District Court power to make an order of arrest under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act, when compliance with the provisions of Section 9, subdivision (b) of the Bankruptcy Act is impossible?

(2) Has the District Court power under Section 2, subdivision (15) of the Bankruptcy Act to make an order for the arrest and detention of an officer of a bankrupt corporation?

(3) Has the District Court power under said Section 2, subdivision (15) of the Bankruptcy Act, to make an order of arrest on the application of a creditor where it appears that demand upon the Trustee in Bankruptcy to make such application would have been unavailing?

Statutes Involved

The applicable statutes appear in the Appendix, *infra*, pages 17, 18.

Statement

On September 23, 1929, an involuntary petition in bankruptcy was filed against Foster Construction Corporation in the United States District Court for the Eastern District of New York, and thereafter said corporation was duly adjudicated a bankrupt (R. 5). The Respondent, Joseph Popkin, is the president of the bankrupt corporation (R. 5). On December 4, 1930, upon the application of the Petitioner, the District Court for the Southern District of New York granted an ancillary order directing the United States Marshall to take the Respondent into custody, and bring him before the court for examination, or, at his option, cause him to give bail in the sum of $10,000.00, that he would not go beyond the territorial jurisdiction of the court without its leave (R. 4, 8). The Respondent was taken into custody under this order, and was released on furnishing bail (R. 9). The Respondent then moved to vacate the order for his arrest, and this motion was denied (R. 29). On appeal to the Circuit Court of Appeals for the Second Circuit, that court reversed and granted the motion to vacate the order of arrest (R. 43).

The Respondent's motion to vacate was based solely on jurisdictional grounds (R. 3). The facts stated in the papers, upon which the writ directed to the United States Marshal was granted (R. 8), are not controverted by any statement appearing in the Transcript of Record. The facts, stated in the papers, are:

Prior to the filing of the petition in bankruptcy against the bankrupt corporation, and in March and April 1929, the

Respondent signed checks of the bankrupt corporation, as its President, for amounts aggregating $100,000., cashed these checks and fled to Canada (R. 5, 20). He remained out of the jurisdiction of the United States until such time as he believed that the creditors of the bankrupt corporation had been placated (R. 6). After the petition in bankruptcy was filed, and in January 1930, a creditor of the bankrupt corporation obtained an order directing the Respondent to appear before a Special Commissioner for examination under Section 21 (a) of the Bankruptcy Act, and the Respondent was duly served with a subpoena (R. 15). He failed to appear (R. 15). His attorney, notified of his default, wrote counsel for the creditor stating that he "had arranged with" the Respondent to appear for examination (R. 15, 24). After this letter was written, the respondent again fled the jurisdiction (R. 15). The Special Commissioner thereafter certified the Respondent for contempt of court (R. 15). Orders to show cause were made by the District Court, directing the Respondent to show cause why he should not be punished for contempt, but, despite diligent efforts to serve these orders to show cause, the Respondent could not be found (R. 15, 24, 27).

On January 27, 1930, on a petition setting forth the foregoing facts (R. 22), a writ was issued by the District Court for the Eastern District of New York, directing the United States Marshal to take the Respondent into custody, and bring him before the court for examination (R. 21). The United States Marshal for the Eastern District never succeeded in finding the Respondent (R. 16).

Ten months later, on December 3, 1930, the District Court for the Eastern District of New York issued a second writ

directing the arrest and detention of the Respondent (R. 13) on the application of the Petitioner setting forth all of the foregoing facts, and alleging further that, during the intervening ten months, creditors had scoured the country in an effort to find the Respondent, and, finally, that the Petitioner had just discovered that the Respondent, apparently satisfied that everything had blown over, had once again ventured to return to New York (R. 14-21). Later, the same court made an order authorizing the Petitioner to apply for ancillary orders of arrest to other courts (R. 10). On December 4, 1930, the District Court for the Southern District of New York granted the ancillary order of arrest (R. 8), under which the Respondent was arrested. It was this order which the District Court sustained on the Respondent's motion to quash and which the Circuit Court of Appeals, on appeal, vacated.

The order of arrest was procured by the Petitioner, a creditor, and not by the Trustee in Bankruptcy who had been appointed in June 1930. The papers on which the order of arrest was made, contained statements showing that the Trustee represented interests adverse to the creditors, had formerly been the Respondent's attorney, that he was friendly with the Respondent, and that it would have endangered the interests of creditors to have even notified the Trustee of the application (R. 6, 19). This Trustee subsequently resigned, and the successor-trustee intervened in the Circuit Court of Appeals and appeared in that Court in support of the order of arrest (R. 38).

Specification of Errors to be Urged

The Court below erred:

1. In holding that the District Court is without power to issue an order of arrest under the omnibus provisions of Section 2 (15) of the Bankruptcy Act, and in limiting the power to issue such a writ to cases falling within Section 9 (b) of the Bankruptcy Act.

2. In holding that the District Court is without power to issue an order of arrest against an officer of a bankrupt corporation.

3. In holding that an order of arrest was improperly granted on the application of a creditor.

Summary of Argument

1. The power of the Bankruptcy Court to issue an order of arrest is not limited to Section 9 (b) of the Bankruptcy Act, but exists under Section 2 (15) of that Act, for:

> (a) The provisions of the omnibus clause in Section 2 (15) are supplementary and a limitation of the powers of the Court to Section 9 (b) ignores the obvious purpose, as well as the explicit provisions, of the omnibus clause.
>
> (b) The supplementary powers granted by the omnibus clause should be invoked "wherever necessary for the enforcement of the Bankruptcy Act", and in all cases to which the provisions of Section 9 (b) are inapplicable.

2. The District Court is authorized, under Section 2 (15) of the Bankruptcy Act to issue orders directing the arrest and detention of an officer of a bankrupt corporation, for:

(a) The District Court is authorized under Section 2, subdivision (15) to issue orders imposing restraints upon third parties not bankrupts where such restraints are necessary for the enforcement of the provisions of the Bankruptcy Act.

(b) Since the court's power flows from Section 2, subdivision (15), the limitations in Section 9 (b), which may be regarded as arising from the use of the word "bankrupt" in Section 9 (b), are irrelevant and impose no restriction on such power.

(c) Since the court's power flows from the Bankruptcy Act the provisions of the Judicial Code, Section 261, are irrelevant and impose no restriction on such power.

(d) For the purpose of submitting to examination, the officers of the bankrupt corporation are the "bankrupt" and, therefore, for the purpose of being detained within the jurisdiction and being restrained from leaving the jurisdiction to avoid examination, the officers of the bankrupt corporation should be regarded as the "bankrupt".

3. The District Court is authorized, under Section 2(15), to issue an order of arrest on the application of a creditor, upon proof that demand upon the Trustee in Bankruptcy, then in office, to make such application, would be unavailing, for:

(a) The powers of the court to make any orders necessary for the enforcement of the provisions of

the Bankruptcy Act under Section 2, subdivision (15) are without limitation as to the party upon whose application the order is made.

(b) A creditor is authorized under Section 21, subdivision (a) of the Bankruptcy Act to procure the examination of persons in bankruptcy; and

(c) It is well settled law that a *cestui que* trust need not show a refusal by a trustee to act after request made of him to act, as a condition precedent to any right of action, where proof is made that a demand would be unavailing.

ARGUMENT

I

The District Courts have power to issue orders of arrest under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act.

In the case at bar, the Circuit Court below held that an order of arrest, such as the one issued here, could only be made pursuant to Section 9 (b) of the Bankruptcy Act, which specifically provides for the arrest and detention of bankrupts, and that the order must be vacated because it was not authorized by that section. The Court held further that general authority to issue orders under Section 2 (15) of the Bankruptcy Act "cannot be regarded as extending a power so specifically granted" (R. 41).

This holding ignores not only the very language of the omnibus clause in Section 2 (15), but the manifest purpose of that section, for thereby Congress invested the

District Courts with "power to make such orders • • • *in addition* to those specifically provided, which may be necessary for the enforcement of the provisions of the Bankruptcy Act." (Italics ours.) Since, by the explicit terms of this omnibus clause, Congress *added* general powers to the powers specifically granted by the other provisions of the Bankruptcy Act, these general powers must be deemed to extend to all cases to which such specific grants of power as are provided by Section 9 (b) do not apply, and in which, nevertheless, the exercise of the power is "necessary for the enforcement of the provisions of the Act." Indeed, the proper construction of a statute which grants specific powers and general powers "in addition" requires that both be given effect.

This has been the construction of the purpose and effect of the omnibus clause. Thus, Section 11 of the Bankruptcy Act authorizes the District Courts to stay proceedings in suits commenced *before* the petition in bankruptcy is filed. The courts have unhesitatingly referred to the reservoir of power provided in Section 2, subdivision (15) of the Bankruptcy Act for authority to stay suits commenced *after* the petition is filed, and have not regarded their powers as limited by the express provisions of Section 11, "since the stay of suits against the bankrupt is absolutely necessary to give effect to the Bankruptcy Act." In *re Basch,* 97 Fed. 761.

In the case of orders of arrest and detention, likewise, the District Courts which have had occasion to consider the question and the text writers on the Law of Bankruptcy have concluded that "arrest and detention under Section 9 (b) is not the exclusive method" and that this power may

be exercised where "the specific provisions of Section 9 (b) of the Bankruptcy Act are inadequate," in such instance, as where the time limitations of that section have expired. In *re Lipke*, 98 Fed. 970, *Matter of Cohen*, 136 Fed. 999; *Matter of Berkowitz*, 173 Fed. 1012; *Hoffschlaeger Co.* v. *Young Nap*, 12 A. B. R. 510, 2 Haw. Dist. 90; Remington on Bankruptcy (3rd Ed.) Vol. 1, Sec. 426. By the provisions of Section 9 (b) the application for the order of arrest must be made before the expiration of one month after the qualification of the Trustee, and the detention can only be had for a period of ten days. These limitations compelled the District Court, in *re Lipke, supra,* to state that "considering the manifest insufficiency of Section 9 (b) to secure the effective administration of the act, I cannot doubt it was intended by Section 2, subdivision (15) to authorize the court to make all orders and issue any process necessary."

The cases cited in the opinion of the court below are not authority for that court's holding. In *re Hale,* Fed. Cas. 5911 (R. 41) was decided prior to the present Bankruptcy Act. In *re Hassebusch,* 108 Fed. 35 (R. 41) is authority for the rule that an order of arrest may only be issued against "one at the time within the jurisdiction of the court."

In the case at bar the court issuing the writ had satisfactory proof before it (1) that the party to be arrested had disobeyed the orders of the court for his examination, had successfully avoided examination during the fifteen months which had elapsed since the commencement of the bankruptcy proceedings, and was now about to leave the jurisdiction to avoid examination, and (2) that his immediate

examination was necessary for the enforcement of the provisions of the Act, since he was the president of the bankrupt corporation and had failed to account, and had apparently absconded with $100,000 of the cash assets of the bankrupt corporation. The time limitation contained in Section 9 (b), in any event, made that section inapplicable since five months had elapsed since the election of the Trustee.

The necessity of the order of arrest for the enforcement of the provisions of the Bankruptcy Act being clear, the exercise of the court's power under Section 2 (15) was eminently justified.

II

Under a proper construction of Section 2, subdivision (15) the District Court is authorized to issue orders directing the arrest and detention of officers of bankrupt corporations.

The holding of the Circuit Court of Appeals in the case at bar that an order of arrest cannot be made against an officer of a bankrupt corporation ignores the latitude of the power vested by Congress in the District Court by the omnibus provisions of Section 2, subdivision (15). The power to issue orders necessary for the enforcement of the Bankruptcy Act is not limited to bankrupts. It is under this very section that District Courts have issued orders imposing restraints on third parties not bankrupts. Thus, in *White* v. *Schloerb*, 178 U. S. 542, this court held that under said Section 2, subdivision (15) the District

Courts could compel persons to restore property to the estate of bankrupts. In *re Jersey Island Packing Co.*, 138 Fed. 625, the court, by virtue of its powers under the very section in question, enjoined parties not bankrupts from from making any transfer or disposition of the debtor's property. Section 2, subdivision (15) contains no limitation whatsoever as to the party against whom such an order is issuable.

The court below urged that Section 9 (b) authorizes the arrest and detention of the "bankrupt" and that "an officer of a bankrupt corporation is not the bankrupt" (R. 42). Such limitations as exist in Section 9 (b) impose no restriction upon the powers granted by Section 2 (15). Indeed, it is the very limitations of Section 9 (b) which justify the reference to the supplementary powers granted by Section 2 (15).

Again, the court below urged that the order of arrest here is analogous to the historic writ *ne exeat*, the issuance of which is limited by Section 261 of the Judicial Code, which provides that a writ of *ne exeat* "can only be issued against a party defendant" (R. 40, 41). It is well settled, however, that the provisions of the Revised Statues and the Judicial Code are inapplicable to and do not limit any power conferred by the provisions of the Bankruptcy Act. Thus, in *Matter of Russell*, 101 Fed. 248, the power of the Bankruptcy Court to issue injunctions under Section 2 (15) was held not subject to the restrictions of the provisions of the Revised Statutes specifically applicable to injunctions.

Further, it is of the greatest importance that, in corporate bankruptcies, the individuals who are the officers of bankrupt corporations should be subject to such process as is provided by an order of arrest. Corporations act neces-

sarily by and through individuals. Unquestionably, the fiction of a corporate entity and the distinction between the corporation as an entity and the human beings who are interested in it, is an essential one for a variety of purposes. But where it would stultify logic and work an obvious circumvention of justice to insist upon the form and to fail to recognize the fact that the activities of the corporation are the activities of human beings acting in behalf of the corporation, the courts have been quick to look to the natural persons, and to direct their commands and prohibitions to them directly.

Section 7(a) subdivision (9) of the Bankruptcy Act requires the bankrupt to "submit to examination." It must be clear that, for the effective administration of the Bankruptcy Act, in so far as the corporate bankrupts are concerned, these duties must be regarded as the duties of the natural persons "*in esse,*" who have had the conduct and management of the corporation's business in their hands. As the District Court observed:

> "Officers of a bankrupt corporation are regarded in courts of bankruptcy as the bankrupts for many purposes which it is unnecessary to enumerate. Cf. Remington on Bankruptcy, sec. 542, pp. 1977, 2384; and see, also Remington on Bankruptcy, Sec. 3009; in Re Alphin & Lake Cotton Co., 131 Fed. 824, 825, 826; in re Fixen & Co., 96 Fed. 748, 752; in re Horgan & Slattery, 98 Fed. 414, 415, 416 (C. C. A. 2); in re Muncie Pulp Co., 139 Fed. 546, 548 (C. C. A. 2); in re Royce Dry Goods Co., 133 Fed. 100, 106; in re Cantelo Mfg. Co., 185 Fed. 276" (R. 33, 34).

It is submitted that the power of the court to compel obedience to its orders by officers of a bankrupt corporation

is a necessary incident to the general power of the court of bankruptcy granted it under Section 2, subdivision (15) to make any orders necessary for the effective administration of the Bankruptcy Act.

The District Court in the case at bar was, indeed, fully persuaded that "if this court did not have the power here invoked and exercised dishonest officers of bankrupt corporations could flout the bankruptcy law with impunity" (R. 34).

III

Under a proper construction of the powers of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, the District Court has power to make an order of arrest on the application of a creditor.

The Circuit Court of Appeals in the case at bar held that the order was improperly granted below because it was applied for by a creditor and not by the Trustee in Bankruptcy, citing *In re Lewensohn*, 121 Fed. 538, and *In re Rogers Johnson Bldg. Co.*, 30 Fed. (2d) 353. The *Lewensohn* case was concerned with the right of a creditor to appeal from an allowance of the claim of another creditor. The *Rogers* case was concerned with the right of a creditor to appeal from an order of a referee declaring a trust deed valid, where the Trustee declined to prosecute the appeal, and both the referee and the District Court, after a consideration of the facts, sustained the decision of the Trustee not to appeal. Neither case presents facts in any way analogous to the facts presented in the case at bar.

Section 2, subdivision (15) of the Bankruptcy Act, which invests the court with the power to make "any orders or issue any process necessary for the enforcement of the provisions of the Bankruptcy Act," does not limit the power of the court to cases where the application for the exercise of the power is made by a trustee in bankruptcy. Section 21, subdivision (A) of the Bankruptcy Act, indeed, provides that "a court of bankruptcy may, upon the application of any officer, bankrupt, or *creditor*, by order require any designated person to appear in court to be examined concerning the acts, conduct and *property* of the bankrupt." (Italics ours.)

In the instant case, a creditor of the bankrupt who had filed its claim, had applied for and procured an order directing the examination of the Respondent, and had then applied for and procured the order of arrest. Since the court had authority to make the order directing the examination of the Respondent at the instance of a creditor, then, under Section 2, subdivision (15) it had the general power to make any order, at the instance of a creditor, necessary for the enforcement of its order directing the examination of the Respondent.

Furthermore, the facts here disclosed would clearly justify the granting of the order at the instance of the creditor, instead of the Trustee in Bankruptcy, for they made it entirely clear that any request by creditors addressed to the Trustee in Bankruptcy to act against the Respondent would not only have been futile but would have been prejudicial to the interests of creditors (R. 11-12, 34-5, 43-4).

Courts of equity which have forbidden *cestuis que* trust from taking action unless the trustee refuses to act, have

recognized the rule of equity that the request need not be made if it would be futile, if, *e. g.*, the trustee by his conduct had made it clear that he would not act if requested. *O'Connor* v. *Virginia Passenger and Power Co., et al.*, 184 N. Y. 46.

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit is erroneous and should be reversed.

LEO J. LINDER,
Attorney for Petitioner.

APPENDIX

(BANKRUPTCY ACT OF 1898, AND ITS AMENDMENTS)

SECTION 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

SECTION 7, SUBDIVISION a. The bankrupt shall * * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

SECTION 9, SUBDIVISION b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustees, upon satisfactory proof by the affidavits of

at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

SECTION 21, SUBDIVISION a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *